Supreme Court of the United States

OCTOBER TERM, 1941.

No. 237.

WILLIAM G. WHEAT, PETITIONER,

VS.

FORD MOTOR COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

EVERETT MEYERS,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

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To the Honorable Supreme Court of the United States:

Petitioner respectfully prays a rehearing on the following grounds:

I.

The opinion of this court in *Schriber-Schroth Company* v. *Cleveland Trust Company*, 311 U. S. 211, 217-218, did not as applied to record in this case justify the ruling of the circuit court of appeals to the effect that each claim of the patent:

> "* * * is for a combination of elements arranged in a specific way, for the purpose of lowering the body of an *already constructed* automobile" (Tr. 488).

Said statement in the opinion of the court of appeals is followed by the statement (Tr. 488) that

> "It is apparent that, in view of the file wrapper history of this patent, its specifications, and the state of the prior art, only a narrow scope should be given to the claims of the patent, *Schriber-Schroth Company* v. *Cleveland Trust Company et al.*, 311 U. S. 211, 217-218, and that the patent could be accorded only a narrow range of equivalents" (Tr. 488).

The finding that the patent was for use only in "an already constructed automobile" operated to render the discussion in the opinion of the court of appeals from pages 488 to 490 of the transcript entirely *obiter*. The one question decided by the court of appeals and by the trial court (Tr. 456) which rendered discussion of any other question superfluous was the ruling that the patent as a matter of law and as a matter of construction applied only to *already constructed automobiles* and that it could not be infringed by embodiment in automobiles either before or *while being constructed originally*.

The fact that the opinion applied the "file wrapper history" rule, the "state of the prior art" rule and the "narrow range of equivalents" rule to the patent after finding that its use in a new automobile could not infringe discloses that the court of appeals was construing the patent by something external thereto and outside its language. That is to say the court of appeals resorted to "the patent office history" the "state of the prior art" and "the narrow range of equivalents" theories to enable said court to restrict the language of the patent and to limit the use of the patent to old cars and to authorize the embodiment of the patent in new cars without infringement rather than finding a basis for such ruling in the *language of the patent itself*. To restrict the written

instrument thus is to *construe* it—and to construe it *narrowly* in violation of the rule that patents are to be *liberally* construed so as to secure to the inventor the real invention which he intends to secure by his patent and in violation of the rule that technicalities or inaccuracies will not be permitted to prevent this result. That time-honored rule (*Henry* v. *Dick Brewing Co.*, 224 U. S. 1; *Winans* v. *Densmead*, 15 How. 330) the court of appeals ignored.

The court of appeals overlooked the consideration that patentees are a meritorious class and that all the aid and protection which the law allows the court will cheerfully give them (*Holloway* v. *Whiteley*, 4 Wall. 522). The opinion therefore changes the law. The acts of Congress providing for the right of a patentee to exclude others from using his patent has thus been ignored and the intentional appropriation of petitioner's property by respondent in its new automobiles or accused structures approved.

We most respectfully submit that the decisions of both lower courts holding that a patentee's patent may be appropriated bodily and entirely if only it be used in *new structures* instead of in *old* where the language of the patent does *not expressly* limit it to old structures are without support in the decisions of this and every other court and are directly in conflict with all of the decisions applying the *liberal* rule of construction (see Walker on Patents, Deller's Ed., Sec. 241).

The opinion of the trial court recites:

> "* * * the plaintiff, therefore, obtained a patent for means or devices which became efficient in *lowering the bodies* of automobiles *already constructed*" (italics by trial court, Tr. 456).

The patent (Tr. 287-295) contains neither express nor implied limitation to "already constructed" automobiles. If anything, the patent expressly contemplates embodi-

ment in an "originally constructed" automobile. In the specification is the recital:

"It is *manifest* that with a car *constructed* in this manner, etc." (Tr. 293). Thus it appears that the specification did not use the word "reconstructed." That word was in effect interpolated by the court of appeals into the patent in lieu of the word "constructed." The latter word was read out of the patent.

Of course the drawings (always distorted for purposes of clarity and hence sometimes positively misleading when compared with the photograph of an accused structure) having to do with devices or contrivances conveniently referred to as "attachments" to be embodied in an automobile and this circumstance may have misled the court of appeals and the trial court. But such circumstance could apply to every invention having to do with any machine and if applicable here would authorize every manufacturer of a *new* structure to appropriate any patent, without being guilty of infringement, which could be embodied in an *old* or *already constructed* machine.

The recognition of such principle (so formulated by the lower courts) by this court would revolutionize the law applicable to patents. The *narrow* rule of construction applied by the courts below is therefore in direct conflict with the *liberal* rule as to patents which has heretofore obtained in this court and every circuit court of appeals including that for the eighth circuit. And since the patent has expired there can be no conflict between the decision of another circuit court of appeals and that of the court below with reference to this patent. Thence the conflict above outlined is sufficient under *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, to justify the issuance of the writ.

II.

There is no conflict between the parties as to the facts in this record. Respondent's witnesses establish the

fact that the front cross member (Tr. 180) or "less deeper arched cross member" (Tr. 271) of the accused structure (Tr. 271) lowers the automobile by the same means in the same way and performs the same function as the front bracket of the patent illustrated by the exhibits shown at transcript 269. The physical facts and copyrighted advertising of respondent (Tr.) establish that the other elements of the patented combination are integrally duplicated in the accused structure. Again respondent's chief expert established that the patented combination "precisely that construction"—"the specific combination, the specific construction" never existed until petitioner created it (Tr. 251). Said expert also testified that he had seen "structures that accomplish the same result." The only structure described by him which accomplished the same result is the accused structure (Tr. 252).

III.

The principle of the decision of the circuit court of appeals relieving an infringer of the consequences of his infringement by enabling him to use the mental concept which constitutes the subject matter of every patent (*U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178-224, l. c. 188) if only he has sense enough to use it in *new* or *original construction* frustrates the purpose of the Constitution empowering Congress to promote the progress of science and the useful arts by legislation, the purpose of the acts of Congress enacted in the exercise of said constitutional authority and the efforts of that branch of the governmental executive department known as the "Patent Office" to secure for the time limited by the acts of Congress the exclusive right to make and use any invention covered by a patent to the patentee thereof. These considerations in and of themselves demonstrate that this is a case necessitating the exercise by this Honorable Court of the discretion vested in it by the statute authorizing it to issue writs of certiorari to circuit courts of appeal.

The question as to whether or not a patent applies to an *old structure only* and therefore cannot be infringed by embodiment *in a new structure* must henceforth (if the opinion of the court of appeals be permitted to stand) depend not on the language of patent but on the discretion of the judge construing it. Hence, the decision below destroys the property element in patents which was heretofore supposed to be an integral part of same (Walker on Patents, Deller's Ed., Sec. 234, p. 1188). The decision of the court of appeals is itself the law rather than the statutes but a court cannot thus destroy property.

The power of a court to make law and to manufacture justice of a brand to suit its ideas would not be above the just claim of a final judicature if it were not a condition precedent to the exercise of such power and the rendition of such justice that the leading principle on which it must be based would be its own discretion. We respectfully call attention to the history of the world and to the lessons which, in this respect, must be deduced therefrom to the effect that whenever the life, liberty or property of any human being was made dependent for its preservation on the discretion of any man or tribunal the direct consequence was that the first franchise and first right of that human being and, incidentally, all those which thereon vitally depend, is to be vitiated for some cause of which no man knows and is to be proved by no known rule whatsoever of legal evidence. This is so anomalous, not alone to our whole Constitution, but to the civilization which has been evolved by the English-speaking race that we venture to say that the most trivial right which the citizen claims never was nor ever can be lawfully vitiated in such manner. That a court could properly decide by such rule could be supported only by the following method of reasoning: A court of last resort does not make laws. No, such power is not contended for; it only declares law and, as it is a tribunal both competent and supreme, what it declares to be law be-

comes law, though it was never law before. Then the circumstance that there is no appeal from its decision is made to imply that it is unnecessary to follow any rule or constitutional mandate in its exercise. The judgment does not derive its validity from conformity to the law, but preposterously the law is made to attend on the judgment, and the rule of the judgment is no other than the arbitrary and occasional will of the individual constituting the court. An arbitrary discretion leads, legality follows, which is just the very nature of a legislative and, hence, an arbitrary act.

The idea dominating the character of discretion herein referred to is that which in remote and barbarous ages resulted in the denial of human rights and the annihilation of human freedom. It is the species anathematized in the quaint and pointed phrase of Coke when he denounced the determination of legal questions by "the crooked cord of the discretion of the judges," rather than the "golden 'metawand' of the law." Such a discretion is well characterized by Camden in the court of common pleas in the trial of Hindson and Kersey when he said:

> "The discretion of a judge is the law of tyrants. It is always unknown. It is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice. In the worse it is every vice, folly and passion to which human nature is liable."

IV.

It is, therefore, respectfully submitted that the conflict between the opinion of the court of appeals (Tr. 488) interpolating something into the patent that is not in it and reading that out of it which is in it and those of this court and the other circuit courts of appeal referred to in the petition for the writ and petitioner's reply brief from which it appears that the court of appeals ignored the time-honored liberal rule of construction theretofore followed by this court and all other federal courts in

construing patents (Walker on Patents, Deller's Ed., Sec. 241) which construction is a question of pure law and not of fact (Walker on Patents, Deller's Ed., Sec. 245) necessitates the granting of a rehearing, the setting aside of the order denying the writ, and the granting of the writ of certiorari to the end that the application of the above time-honored rule of construction may continue to function and that the law itself may not be changed and that the law may determine the fate of petitioner's patent rather than the novel and unauthorized rule followed by the circuit court of appeals.

Respectfully submitted,

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We hereby certify that the above Petition for Rehearing is filed in good faith and not for delay.

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Attorneys for Petitioner.

Dated at Kansas City this 4th day of November, 1941.